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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
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8 LANCE REBERGER,

9 *Plaintiff,*

10 vs.

11 OFFENDER MANAGEMENT DIVISION,  
12 *et al.*

13 *Defendants.*  
14

3:12-cv-00293-LRH-VPC

ORDER

15 This prisoner civil rights action by a Nevada state inmate comes before the Court on plaintiff's  
16 second (#4) application for leave to proceed *in forma pauperis*, on his two motions (## 4 & 8) to raise  
17 his prison copy credit limit, and for initial review under 28 U.S.C. § 1915A.

18 On the pauper application, the Court finds that plaintiff is unable to pay a substantial initial  
19 partial filing fee. The application therefore will be granted, subject to the remaining provisions herein.  
20 The Court thus turns to initial review of the complaint.

21 ***Screening***

22 When a "prisoner seeks redress from a governmental entity or officer or employee of a  
23 governmental entity," the court must "identify cognizable claims or dismiss the complaint, or any  
24 portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon  
25 which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such  
26 relief." 28 U.S.C. § 1915A(b).

27 In considering whether the plaintiff has stated a claim upon which relief can be granted, all  
28 material factual allegations in the complaint are accepted as true for purposes of initial review and are

1 to be construed in the light most favorable to the plaintiff. *See, e.g., Russell v. Landrieu*, 621 F.2d 1037,  
 2 1039 (9th Cir. 1980). However, mere legal conclusions unsupported by any actual allegations of fact  
 3 are not assumed to be true in reviewing the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-81 & 686-  
 4 87 (2009). That is, bare and conclusory assertions that constitute merely formulaic recitations of the  
 5 elements of a cause of action and that are devoid of further factual enhancement are not accepted as true  
 6 and do not state a claim for relief. *Id.*

7 Further, the factual allegations must state a plausible claim for relief, meaning that the well-  
 8 pleaded facts must permit the court to infer more than the mere possibility of misconduct:

9 [A] complaint must contain sufficient factual matter, accepted as  
 10 true, to “state a claim to relief that is plausible on its face.” [*Bell Atlantic*  
 11 *Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167  
 12 L.Ed.2d 929 (2007).] A claim has facial plausibility when the plaintiff  
 13 pleads factual content that allows the court to draw the reasonable  
 14 inference that the defendant is liable for the misconduct alleged. *Id.*, at  
 15 556, 127 S.Ct. 1955. The plausibility standard is not akin to a  
 “probability requirement,” but it asks for more than a sheer possibility  
 that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads  
 facts that are “merely consistent with” a defendant’s liability, it “stops  
 short of the line between possibility and plausibility of ‘entitlement to  
 relief.’ ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

16 . . . . [W]here the well-pleaded facts do not permit the court to  
 17 infer more than the mere possibility of misconduct, the complaint has  
 alleged - but it has not “show[n]” - “that the pleader is entitled to relief.”  
 Fed. Rule Civ. Proc. 8(a)(2).

18 *Iqbal*, 556 U.S. at 678.

19 Allegations of a *pro se* complainant are held to less stringent standards than formal pleadings  
 20 drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

21 Plaintiff Lance Reberger alleges that he was transferred to Ely State Prison (“Ely”) in retaliation  
 22 for his having filed a motion for a preliminary injunction, under circumstances discussed in more detail  
 23 below. In three counts, plaintiff alleges that the retaliatory transfer denied him due process of law under  
 24 the Fifth Amendment (Count I), constituted cruel and unusual punishment in violation of the Eighth  
 25 Amendment (Count II), and due process of law under the Fourteenth Amendment (Count III). He seeks  
 26 injunctive and declaratory relief as well as compensatory damages for mental anguish, emotional  
 27 distress, and pain and suffering along with punitive damages. He seeks recovery from the “Offender  
 28 Management Division” (OMD) and its administrator in their individual and official capacities.

1 Plaintiff may not obtain relief under any of the constitutional provisions that he expressly  
2 invokes in the three counts. Whatever constitutional protection is provided against retaliation for  
3 engaging in litigation activity, it does not arise under either the Due Process Clause of the Fifth or  
4 Fourteenth Amendments or by virtue of the Eighth Amendment's prohibition against cruel and unusual  
5 punishment. A state inmate has no constitutionally protected due process right to to be housed in one  
6 facility rather than another. *See, e.g., Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir.1987). Nor  
7 does transfer to a different facility constitute cruel and unusual punishment. Plaintiff's formulaic  
8 recitals to the contrary are frivolous.

9 The First Amendment potentially provides protection against substantial action taken in  
10 retaliation for an inmate exercising his right to access the courts. However, plaintiff's allegation that  
11 he was transferred to Ely in retaliation for litigation activity is frivolous on its face.

12 Reberger alleges the following. His caseworker told him on February 16, 2012, that OMD had  
13 put him in for transfer to Ely on February 1, 2012. On or about February 23, 2012, Reberger  
14 constructively filed an emergency motion for a preliminary injunction in this Court in No. 3:12-cv-  
15 00112-RCJ-WGC seeking to block the transfer to Ely. On March 7, 2012, while his motion still was  
16 being litigated, Reberger asked his co-worker whether the transfer to Ely had been approved yet, and  
17 the caseworker responded that it had not. Thereafter, allegedly on March 15, 2012, the Magistrate  
18 Judge in the prior case issued a report and recommendation in which denial of the motion for  
19 preliminary injunction was recommended.<sup>1</sup> Purportedly the "next day" (in truth, as reflected by the note  
20 below, instead nine days after the hearing where the Magistrate Judge stated to the parties that he found  
21 against plaintiff), OMD approved Reberger's transfer to Ely.

22 Plaintiff urges that it is "obvious" that the defendants transferred him to Ely in retaliation for  
23 his having filed the motion for preliminary injunction restraining the transfer that was not granted.  
24 Plaintiff's tortured logic not only is not obvious, it is wholly frivolous. What instead is obvious from  
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26 <sup>1</sup> The record from the prior proceeding in fact indicates: (a) that the Magistrate Judge told the parties at the  
27 March 7, 2012, motion hearing that he found that no showing had been made to warrant a preliminary injunction; and (b)  
28 that the written report and recommendation was entered on March 12, 2012. On March 7, 2012, the Magistrate Judge  
specifically denied plaintiff's request that his transfer be delayed until such time as his objection to the report and  
recommendation (which never was filed) was resolved. *See* No. 3:12-cv-00112-RCJ-WGC, #10, at 2 (sealed filing).

1 the nonconclusory allegations of actual fact presented is that defendants did not proceed with the  
 2 transfer while plaintiff's motion to block the transfer was under consideration and that they proceeded  
 3 with the transfer only after plaintiff's request for interim relief was rejected.<sup>2</sup> Under plaintiff's tortured  
 4 "heads I win, tails you lose" logic, defendants could not transfer plaintiff to Ely regardless of the  
 5 outcome on his motion. If he won the motion, the Court's order would bar defendants from transferring  
 6 him; and, under plaintiff's flawed logic, even if he lost the motion, defendants could not transfer him  
 7 because to do so would be in retaliation for his pursuing the motion to block the transfer that plaintiff  
 8 effectively lost. The Court denied interim relief on plaintiff's motion to block the transfer, and  
 9 defendants thereafter were fully free to transfer him. Plaintiff's attempt to obtain the relief that instead  
 10 was denied by conclusorily labeling the following transfer as a transfer in retaliation for his failed  
 11 request to block the transfer is wholly frivolous.

12 In this same vein, plaintiff's effort to establish retaliatory intent by arguing that he otherwise  
 13 would not have been transferred similarly is frivolous. Under the nonconclusory actual factual  
 14 allegations in the complaint, defendants put in for the transfer *before* plaintiff filed a motion to block  
 15 that transfer and then, once the Court denied interim relief, the transfer was approved and effectuated.  
 16 Regardless of what circumstances plaintiff may believe should or should not lead to a transfer, the  
 17 decision of whether to transfer a particular prisoner from one institution to another is one of the matters  
 18 committed to the discretion of correctional officials in assessing security and other concerns at the  
 19 various institutions under their charge.<sup>3</sup> An inmate's belief that he should not be transferred in the  
 20 circumstances presented does not support an inference of retaliation for litigation activity (particularly  
 21 alleged retaliation for pursuing an unsuccessful request to block the transfer).

22 The complaint therefore is frivolous and fails to state a claim upon which relief may be granted.<sup>4</sup>  
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24 <sup>2</sup> Plaintiff did not file objections to the report and recommendation in the district court, and the action thereafter  
 25 was dismissed after plaintiff failed to file a complaint in response to an order, with all pending motions denied as moot.

26 <sup>3</sup> The Court extensively examined correctional officials' reasons for the – then ongoing – effort to transfer  
 27 plaintiff in the prior action. See No. 3:12-cv-00112-RCJ-WGC, #11 (sealed filing).

28 <sup>4</sup> The complaint further is subject to other deficiencies. First, the Offender Management Division is not a

(continued...)

1 Given that the claims presented are at their core frivolous, the Court finds that amendment  
2 would be futile.

### 3 *Three Strikes*

4 Under the "three strikes" provisions of 28 U.S.C. § 1915(g), a prisoner may not proceed *in forma*  
5 *pauperis* if he has brought, on three or more occasions while incarcerated, an action "that was dismissed  
6 on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted,  
7 unless the prisoner is under imminent danger of serious physical injury."

8 The present dismissal constitutes such a "strike" upon the conclusion of proceedings herein.  
9 This strike is plaintiff's third. Two prior actions have been dismissed for failure to state a claim, being  
10 in particular No. 2:10-cv-02022-GMN-GWF (mandate issued October 30, 2012) and No. 3:11-cv-  
11 00073-LRH-RAM (order as mandate issued June 3, 2011). Plaintiff thus has "struck out" under §  
12 1915(g) upon the conclusion of proceedings herein.

### 13 *Copy Credit Limit*

14 In his two motions to raise his prison legal copy credit limit, plaintiff seeks an "extra" \$100.00  
15 for copies in three actions in this Court. The two other actions referenced in the motion have been  
16 dismissed, and this action is being dismissed by this order.

17 Plaintiff thus does not need to make copies for service in any of the actions. Even if the actions  
18 had not been dismissed, service may not proceed until after the Court directs service in a screening  
19 order. Even in that instance, the Attorney General informally accepts service for many corrections  
20 defendants without the requirement for service of hard copies of a summons and complaint. An inmate  
21 plaintiff seeking to sue correctional defendants thus would have no occasion to make copies for service

22  
23 <sup>4</sup>(...continued)

24 juridical entity that can be sued. Second, even if it were, as a division of the state corrections department, it may not be  
25 sued in federal court due to the state sovereign immunity recognized by the Eleventh Amendment, regardless of the  
26 relief sought. Third, the remaining defendant officer may not be sued for monetary damages in his official capacity.  
27 Fourth, under 42 U.S.C. § 1997e(e), plaintiff may not recover on the allegations presented for compensatory damages  
28 for mental anguish, emotional distress, or pain and suffering. It further is subject to substantial question whether  
plaintiff in effect can collaterally attack the denial of relief in the prior – fully concluded – case by labeling action fully  
consistent with the Court's orders in that case as "retaliation" for plaintiff filing a motion to block that very same action  
that plaintiff failed to block. The Court only notes these additional deficiencies in passing given that the entire  
complaint is frivolous and fails to state a claim upon which relief may be granted.

1 unless and until the Court ordered service for a response and then only as to defendants for whom the  
2 Attorney General thereafter did not accept service.

3 Plaintiff thus also has no need to make copies “to file for discovery from all the defendants on  
4 all cases.” Even if the cases had not been dismissed, discovery would not proceed until the Court issued  
5 a scheduling order providing for discovery deadlines. Plaintiff does not need to have his credit limit  
6 raised at the outset of an action to direct discovery to all defendants in all of his cases.

7 Plaintiff further refers to additional actions that he plans to file. If plaintiff indeed files such  
8 actions – and overcomes the three-strikes provision referenced in the preceding section – he will have  
9 to make his request to raise the copy credit limit with regard to those actions in those actions, not this  
10 one.

11 Finally, the Court notes that it typically does not grant a request to raise an inmate’s copy credit  
12 limit based upon a bald assertion by the inmate that he has exceeded the limit. The inmate must attach  
13 a copy of a recent administrative denial of copies reflecting that he is over the limit. The Court further  
14 typically does not grant such requests in multiple \$100.00 increments. If a request is approved in the  
15 first instance, the Court typically approves only a much smaller amount, such as \$10.00, actually  
16 necessary to conduct then-ongoing proceedings in the particular case before it. No such need is evident  
17 here.

18 The Constitution does not require that state authorities provide plaintiff either with free copies  
19 or with the substantial equivalent of open-ended or unlimited credit for copies. *See, e.g., Gluth v.*  
20 *Arizona Department of Corrections*, 951 F.2d 1504, 1510 (9th Cir. 1991).

21 The two motions therefore will be denied.

22 IT THEREFORE IS ORDERED that the second application (#4) to proceed *in forma pauperis*  
23 is GRANTED, subject to the remaining provisions herein. Plaintiff shall not be required to pay an  
24 initial partial filing fee. However, even if this action is dismissed, the full \$350.00 filing fee still must  
25 be paid pursuant to 28 U.S.C. § 1915(b)(2).

26 IT FURTHER IS ORDERED that plaintiff is permitted to maintain this action to a conclusion  
27 without the necessity of prepayment of any additional fees or costs or the giving of security therefor.  
28 This order granting paupers status shall not extend to the issuance of subpoenas at government expense.

1 IT FURTHER IS ORDERED that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada Department  
2 of Corrections shall pay to the Clerk of the United States District Court, District of Nevada, 20% of the  
3 preceding month's deposits to plaintiff's account (in the months that the account exceeds \$10.00) until  
4 the full \$350 filing fee has been paid for this action. The Clerk shall SEND a copy of this order to the  
5 Finance Division of the Clerk's Office. The Clerk shall also SEND a copy of this order to the attention  
6 of the **Chief of Inmate Services for the Nevada Department of Corrections, P.O. Box 7011, Carson**  
7 **City, NV 89702.**

8 IT FURTHER IS ORDERED that plaintiff's motions (## 5 & 8) to raise his copy credit limit  
9 are DENIED.

10 IT FURTHER IS ORDERED that this action shall be DISMISSED as frivolous and for failure  
11 to state a claim, with this dismissal counting as plaintiff's third "strike" under 28 U.S.C. § 1915(g) upon  
12 the conclusion of proceedings herein. See text, *supra*, at 5.

13 The Clerk shall enter final judgment accordingly, in favor of defendants and against plaintiff,  
14 dismissing this action.

15 DATED this 29th day of November, 2012.



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18 LARRY R. HICKS  
19 UNITED STATES DISTRICT JUDGE  
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